2014-1802

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPLE INC., a California corporation,

Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD., a Korean corporation, SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, AND SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California in No. 5:12-cv-00630-LHK, Judge Lucy H. Koh.

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Counsel for Plaintiff-Appellant Apple Inc. certifies the following:

1. The full name of every party or amicus represented by us is:

   Apple Inc.

2. The names of the real party in interest represented by us is:

   Not applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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INTRODUCTION

In the proceedings below, Samsung sought to avoid liability and minimize damages by repeatedly representing that its infringing features are insignificant and that it can remove those features from its smartphones in thirty days or less using already-existing alternatives and simple software updates. Relying on those many assurances, Apple proposed a narrow injunction that merely sought to enjoin the infringing features (not entire products) and that included a sunset provision providing Samsung with the maximum amount of time that it claimed to need to implement design-arounds. As Apple explained in its opening brief, the district court abused its discretion by denying that limited injunctive relief—which is entirely commensurate with the inventive contribution and value of Apple's infringed patents, and would help remedy the irreparable reputational and sales-based harms caused by Samsung's massive infringement.

On appeal, Samsung argues that Apple cannot obtain its requested injunction without proof that the infringing features drive demand for Samsung's entire products—because, according to Samsung, it cannot sever its infringing features from the products containing them and the extra time afforded by the sunset provision supposedly "does nothing," even now, eight months after the jury verdict. That argument should be rejected: (1) as conflicting with Samsung's representations to the district court and jury; (2) as an improper categorical rule

that would require all patentees to prove that an infringing feature drives demand for the product containing it, even where the injunction is limited to the feature alone; (3) as inconsistent with *Douglas Dynamics, LLC v. Buyers Products Co.*, 717 F.3d 1336 (Fed. Cir. 2013), which did not impose any such condition in awarding injunctive relief based on irreparable reputational harm; and (4) as contrary to the record, which shows that the infringing features help drive demand for Samsung's products in any event.

In essence, Samsung seeks to deprive Apple and numerous other patent-holders of their valuable right to exclude so that Samsung can continue its unfettered use of Apple's patented features to compete directly and unfairly against Apple, without fear of consequence. That improper invitation should be rejected as inconsistent with Supreme Court and Federal Circuit precedent. Instead, the Court should bring Samsung's pervasive, harmful, and continuing infringement to an end—and confirm that owners of infringed feature-based patents can obtain more than a mere compelled license—by ordering the district court to enter Apple's proposed injunction.

ARGUMENT

I. SAMSUNG CANNOT JUSTIFY THE DISTRICT COURT'S ERRONEOUS FINDING OF NO IRREPARABLE HARM.

In its opening brief, Apple demonstrated that it has suffered two types of irreparable harm: to its reputation as an innovator and to its market share and

downstream sales. (AppleBr.31-55.) Apple also established a causal nexus for both types of irreparable harm by proposing an injunction that is limited to the infringing features alone and that includes a sunset provision affording Samsung sufficient time to implement design-arounds, by identifying the same proof that demonstrated irreparable reputational harm in *Douglas Dynamics*, and by pointing to evidence collectively showing that consumers, Samsung, and Apple all view the patented features as helping to drive demand.

By contrast, Samsung attempts to salvage the district court's finding of no irreparable harm through arguments that, if accepted, would eviscerate the possibility of injunctive relief in nearly every case involving multi-feature products. This effort to create new "rigid standards" should be rejected. *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1364 (Fed. Cir. 2013) ("*Apple III*") ("[A] rigid standard could, in practice, amount to a categorical rule barring injunctive relief in most cases involving multi-function products, in contravention of *eBay*.").

A. Apple Satisfied The Causal Nexus Requirement By Proposing An Injunction Limited To The Infringing Features Alone.

In past appeals, this Court has rejected requests for broad ***product-based*** injunctive relief due to an insufficient "causal nexus"—a requirement intended to ensure that a patentee does not "'seek[] to leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant.'"

Apple III, 735 F.3d at 1361 (quoting *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1375 (Fed. Cir. 2012)). As Apple has explained, this case is different inasmuch as Apple has proposed an injunction that narrowly enjoins ***the infringing features alone***—which necessarily satisfies the causal nexus inquiry in this case because the proposed injunction is strictly limited to "the inventive contribution and value of the patent." (AppleBr.31-34.)

Samsung raises six arguments in an attempt to avoid that result, none of which has merit.

First, Samsung alleges that Apple failed to raise its feature-based argument before the district court. (SSBr.20.) Below, however, Apple proposed the ***same feature-based*** injunction and repeatedly emphasized the ***same feature-based*** aspect as supporting a finding of irreparable harm. (*E.g.*, A2678 (arguing that irreparable harm existed "particularly given the narrow form of Apple's proposed injunction, which merely enjoins Samsung from further use of the specific infringing ***features***" (emphasis in original)); A2691-92 (noting that because Apple was "seek[ing] an injunction that merely precludes Samsung from using the specific features that the jury found to infringe … [the] injunction is no broader in scope than necessary to protect Apple's valuable patent rights").)

Second, Samsung contends that Apple is trying to "obviate" and "disregard" the causal nexus requirement and to render it "inapplicable" and "not required."

(SSBr.2, 14, 20-22.) But Apple has never suggested that the limited scope of its proposed injunction ***eliminates*** the causal nexus requirement. Rather, Apple has consistently explained that "[t]he purpose and substance of the causal nexus requirement are necessarily ***satisfied***" here because the proposed injunction merely enjoins infringing features. (AppleBr.33 (emphasis added).)[1]

Third, Samsung contends that "[n]o decision [addressing a causal nexus] has ever recognized that distinction [between features and products]." (SSBr.22.) Yet, this Court recognized that precise distinction in *Apple III*. 735 F.3d at 1363 (noting that a delayed injunction "more likely to prevent only infringing *features* rather than the sale of entire *products*" may be "more equitable, and, thus, more justifiable"). Indeed, it is Samsung that lacks legal support for its position—having failed to identify ***any*** decision finding no causal nexus where the proposed injunction merely sought to enjoin the infringing features.[2]

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[1] Samsung makes the same type of misleading characterizations concerning Nokia's and Ericsson's amicus filings. (SSBr.21 n.3 & 22 n.4.) Like Apple, Nokia argues against a categorical rule requiring all patentees to show that a patented feature drives demand for a product, especially for an injunction "narrowly tailored to prohibit only the use of the patented technology." (NokiaBr.9.) Similarly, Ericsson advocates against an "indiscriminate and categorical" rule that always requires patentees to prove that the infringing features drive product demand, regardless of the harm alleged. (EricssonBr.18.)

[2] Samsung incorrectly alleges that "*Apple III* rejected the same kind of 'narrow' injunction argument Apple is making now." (SSBr.22.) *Apple III* did not consider a feature-based injunction and expressly noted that feature- and product-based injunctions are different. 735 F.3d at 1363.

Fourth, Samsung contends that "Apple's argument has a fundamental error of logic" because "[t]he scope of a proposed injunction does not affect whether the plaintiff has been or will be irreparably harmed by the infringement." (SSBr.23.) But there are two inquiries under the irreparable harm prong—the first identifies any potential irreparable harm, and the second looks for a sufficient causal nexus between that harm and the enjoined acts to determine "whether the patentee seeks to leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant." *Apple III*, 735 F.3d at 1361. Logic dictates that "the scope of a proposed injunction" ***must be considered*** as part of that irreparable harm inquiry to determine whether a patentee "seeks to leverage its patent" too broadly. *Id.* at 1363.

Fifth, Samsung states that, "if Apple's theory were accepted, then injunctions would be granted without regard for whether the infringing feature drives demand for the product." (SSBr.24.) Not true. Under this Court's precedent, a patentee must prove that an infringing feature drives demand for the infringer's product for an injunction directed to the entire product. (AppleBr.32.) That is not the case here, where Apple's proposed injunction is apportioned down to the infringing features and thus is entirely commensurate with "the inventive contribution and value" of Apple's feature-based infringed patents.

Finally, Samsung argues that no distinction exists between "an injunction against a feature embedded in a product" and "an injunction against the product until the feature is removed." (SSBr.23-24.) As noted above, however, this Court ***has*** acknowledged the distinction between a product-based injunction that enjoins Samsung from selling smartphones—such as in *Apple III*—and a feature-based injunction that targets Samsung's infringing features, but allows Samsung to continue selling its smartphones if it implements design-arounds within a sunset period. (AppleBr.19-20.) *See Apple III*, 735 F.3d at 1363 ("[A] delayed injunction may be more likely to prevent only infringing *features* rather than the sale of entire *products*, because the defendant would have time to implement a noninfringing alternative.").

Nor does this case involve infringing features that cannot be severed from their products. Indeed, having emphasized at trial that it can quickly and easily remove the infringing features from its products via software updates (A11593-94; A11805-06; A13350-51; A36-37), and having represented on appeal that it has ***already*** done so for many products (SSBr.10, 37), Samsung can hardly oppose an injunction against the same infringing features by arguing that it ***cannot*** separate those features from the product as a whole. In fact, Samsung's continuing refusal to promise an end to its infringement across all present and future products merely

reinforces the importance of Apple's patented technologies and the critical need for injunctive relief in this case.

In sum, Samsung cannot justify its request for a broad new categorical rule barring courts from enjoining ***any*** infringing feature found in a multi-feature product, regardless of how small or easily removed, absent proof that the feature drives demand for the product as a whole—even for injunctions limited to the infringing feature alone. That is not the law, nor should it be.

B. Apple Demonstrated Irreparable Reputational Harm Under *Douglas Dynamics*.

Apple has demonstrated how the district court abused its discretion by declining to follow *Douglas Dynamics*—despite acknowledging that this case involves "similar facts"—and by instead imposing a heightened standard of proof under which it found no irreparable reputational harm. (AppleBr.34-50.) Samsung does not dispute Apple's strong reputation as an innovator, but asserts a host of failed arguments in an attempt to justify the district court's error.

First, Samsung contends that Apple cannot prevail because Apple did not seek damages "based on reputational injury." (SSBr.25-26.) But that merely confirms that Apple's reputational injury is not quantifiable or compensable with money damages—i.e., it ***is irreparable***. *See, e.g.*, *Douglas Dynamics*, 717 F.3d at 1344 (noting that "erosion in reputation and brand distinction" is "often difficult to quantify"). (AppleBr.60 (citing similar cases).)

Second, Samsung criticizes Apple for "provid[ing] no expert testimony on injury to reputation." (SSBr.25.) But there is no legal requirement to prove reputational injury through an expert. Indeed, in *Douglas Dynamics*, this Court found sufficient evidence to ***reverse*** a finding of no irreparable reputational harm without mention of a supposed need for expert testimony. 717 F.3d at 1344-45.

Samsung also purports to rely on its own expert, Dr. Erdem, who stated in a post-trial declaration "that Apple could have tried to demonstrate harm to reputation through well-developed methods of analysis." (SSBr.26, 35.) However, even Dr. Erdem did not purport to apply those supposedly "well-developed methods," and her only trial opinions (which claimed to measure a lack of consumer demand for unrelated features based on how subjects moved their eyes across a computer screen) were deemed unreliable. (A25.) Samsung also cites Dr. Chevalier's sentence-counting of "consumer and professional reviews" (SSBr.35), but omits that the district court also rejected that testimony as "not … persuasive" (a finding that Samsung does not challenge here) (A25).

Third, Samsung attacks the testimony of Phil Schiller, the head of Apple's Worldwide Marketing Group, as mere "generic statement[s]" that "say[] nothing about supposed reputational harm in this case." (SSBr.26-27, 33.) But Mr. Schiller's testimony was precise: He explained (1) how Apple makes "unique and special" products, markets them as "hero," and uses patents "to differentiate [itself]

from the rest of the market," (2) that "the very DNA of Apple" is "an innovator who creates unique differentiations in our products that customers value," and (3) that Samsung's infringement "has caused damage for Apple in the marketplace," in part, because it "confuses customers about … whether Apple is being [an] innovator and doing these things or whether Samsung or someone else is innovating," and that this "diminishes whether people even see Apple as the innovator." (AppleBr.42; A10452-53; A10470-71; A10474-75.) This ***specific*** testimony—from someone exceptionally qualified to discuss how Samsung's infringement affects Apple's business and reputation—was more than sufficient to prove that Samsung's infringement injures Apple's identity as an innovator.[3]

Nor can Samsung properly fault Mr. Schiller for failing to "link the supposed reputational harm" to specific individual patents. (SSBr.26-27, 33.) *Douglas Dynamics* did not demand or rely on ***patent-specific*** proof in holding that a patentee with a reputation as an innovator, and that carefully preserves its right to exclude, "will certainly be damaged" if an infringer uses the patentee's own

[3] Samsung cites district court cases in support of its claim that "[c]ourts routinely dismiss such conclusory testimony of a party's own executive as insufficient to show harm to reputation." (SSBr.27 & n.5.) But none of those cases involved the trial testimony of an executive, none offered the type of specific details that Mr. Schiller did in his testimony, and one patentee even "admitted that it did not have any concrete evidence of lost business or goodwill." *See iCall, Inc. v. Tribair, Inc.*, No. C-12-2406-EMC, 2012 WL 5878389, at *14 (N.D. Cal. Nov. 21, 2012).

inventions to compete directly against the patentee. *Douglas Dynamics*, 717 F.3d at 1344-45 (noting that if Ford infringed a Mercedes patent, "[t]he Mercedes would lose some of its distinctiveness and market lure because competitors could contend that they had 'similar features' without noting that those features infringe Mercedes's proprietary technologies").

In addition, Samsung ignores this Court's clear guidance that, "when considering whether to enjoin a product, it is proper for the court to consider the aggregate harm caused by all of the infringing features, rather than requiring a patentee to address each patent or claim individually." *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1330-31 (Fed. Cir. 2014) ("Infringement of multiple patents by a single device may strengthen a patentee's argument for an injunction by, for example, supporting its argument that the infringed features drive consumer demand or are causing irreparable harm.").

Samsung also attacks Mr. Schiller for failing to identify actual instances of consumer confusion. (SSBr.27.) But actual confusion is not required to prove irreparable reputational harm. *See Douglas Dynamics*, 717 F.3d at 1344 ("Even absent consumer confusion, however, there can still be harm to a company's reputation, particularly its perception in the marketplace by customers, dealers, and distributors.").

Fourth, Samsung asserts that Apple cannot prove irreparable reputational injury because Apple's reputation has remained "extremely robust" despite Samsung's infringement. (SSBr.28, 35.) But as Apple has explained, *Douglas Dynamics* rejected that argument, which would perversely punish companies with stronger reputations. 717 F.3d at 1345 (holding that commercially successful patentees should not "suffer some penalty for managing through great effort to maintain market share in the face of infringing competition"). (AppleBr.43-44.)

Fifth, Samsung represents that, according to Apple, "because Apple and Samsung are competitors, reputational harm can be presumed." (SSBr.29.) That misstates Apple's position. To prove its irreparable reputational harm, Apple relied on the indisputably "fierce" competition between the parties ***in combination with*** the same ***additional evidence*** found sufficient to establish irreparable reputational harm in *Douglas Dynamics*: that Apple has an undisputed reputation as "an amazingly innovative company," while Samsung is known as a "fast-follower"; that Apple seeks to maintain exclusivity over its patents-in-suit by generally refusing to license them; and that Apple loses the ability to market its products as "hero" by emphasizing their unique features when others, like Samsung, compete against Apple using Apple's own patented features. Apple did not depend on any "presumption"; it relied on compelling evidence of irreparable reputational harm of a type that will exist in very few other cases.

Sixth, Samsung contends that "*Douglas Dynamics* did not purport to create any [five-factor] test, but rather made a fact-specific analysis of whether there was actual harm to reputation." (SSBr.29.) Regardless of whether labelled a "test" or an "analysis," *Douglas Dynamics* found irreparable harm based on a record not materially distinguishable from this one—as the district court recognized in its unchallenged finding that the two cases involve "similar facts" (A12)—and "[p]rinciples of *stare decisis* require similar rulings on similar facts…." *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1127 (Fed. Cir. 1993).

Samsung attempts to distance itself from the "less prestigious" infringer in *Douglas Dynamics* by trying to discount the trial testimony of Samsung's top-ranking marketing executive, Mr. Pendleton—who admitted on cross-examination that Samsung is perceived as "not an innovator" but "a fast follower" (A11702-04; A24774)—as "concern[ing] only Samsung's reputation in the past." (SSBr.30.) The undisputed record confirms, however, that Samsung ***still*** had a "lingering reputation as a fast follower" when Mr. Pendleton testified in April 2014. (A2639-46 (December 2013 *New York Times* article noting Samsung's "lingering reputation as a fast follower"); A11707-08 (Mr. Pendleton acknowledging an April 2014 *Wall Street Journal* article (A2647-48) criticizing Samsung for spending "more on [marketing] than focusing on R&D and innovation").)

Moreover, *Douglas Dynamics* did not require proof that the infringer had a weak reputation as a condition of irreparable harm. It merely observed that irreparable reputational harm was "particularly" acute in that circumstance. 717 F.3d at 1344-45.[4]

Seventh, Samsung argues that Apple cannot prove reputational harm because it does not practice the patents-in-suit. (SSBr.36.) However, as Apple has explained, this Court has repeatedly held that "a party that does not practice the asserted patent may still receive an injunction when it sells a competing product," *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1171 (Fed. Cir. 2014), and Apple demonstrated that it practices the '647 and '721 patents in any event. (AppleBr.47-48.)

Nor may Samsung discard the testimony of Apple engineer Thomas Deniau simply because he did not use claim language in his testimony. (SSBr.36 & n.8.) Mr. Deniau is not an expert, and his factual testimony made clear that Apple's data detectors feature practices the '647 patent, particularly in combination with the testimony of Apple's expert, Dr. Mowry. (A10833-34.) Samsung also offers

[4] Samsung also argues that the patent-at-issue in *Douglas Dynamics* "concerned the most fundamental aspect of the product—namely, a 'snowplow assembl[y] for mounting on the front of a truck.'" (SSBr.30.) But the "inventive" aspect was a latch in the "mounting frame," not the assembly as a whole, and the claims additionally required a vehicle and attached snow plow. *Douglas Dynamics*, 717 F.3d at 1339-40. Therefore, like here, the patented invention was directed to a ***component*** of something larger.

unsupported attorney argument that the slide-to-unlock feature of iOS 7 does not practice the '721 patent (SSBr.36-37), but Apple's expert confirmed the opposite at trial (A10637 ("Q. In your opinion, does the iPhone that's available today running iOS 7 practice claim 8 of the '721 patent? A. Yes, it does.")). And even Samsung does not dispute that prior versions of iOS, which many Apple customers still use today, practice the '721 patent.

Ninth, Samsung argues that Apple's agreements with Microsoft and HTC "belie[] [Apple's] argument that infringement harms its reputation" because "other companies can use the features Apple seeks to enjoin use of here." (SSBr.37-38.) But as Apple explained in its opening brief—without response from Samsung—those agreements expressly prohibit the use of features that would diminish Apple's unique user experience, there is no record evidence that either company has offered a product that includes the patented features, and the Supreme Court and this Court have repeatedly rejected attempts to require companies to maintain absolute exclusivity over their patents as a condition of obtaining injunctive relief. (AppleBr.37-38, 45-46.)

Finally, Samsung argues that its trial counsel's inflammatory post-trial statements will not cause others to "believe that Apple does not enforce its intellectual property rights" because the existence of this litigation is well known. (SSBr.31-32.) The relevant question, however, is not whether Apple is prepared to

sue infringers, but whether others will believe that Apple is ***powerless to stop*** infringers from freely using Apple's patented features. By referring to Apple's efforts to enforce its patents as "Apple's Vietnam" and declaring victory because "Apple hasn't collected a penny—or succeeded in taking any products off the market," Samsung's counsel plainly intended for others to believe just that. (A2715-16.)

C. Apple Suffered Irreparable Sales-Based Losses.

In its opening brief, Apple highlighted the district court's findings that Apple and Samsung are "fierce" competitors, "that this competition affects downstream sales," and that Apple will face "substantial hardship" if forced to compete against products incorporating its own patented inventions. (AppleBr.50-55.) Samsung attempts to defend the district court's erroneous finding that this hardship, though "substantial," was not irreparable, by urging the Court to ignore relevant evidence demonstrating a causal nexus between Samsung's infringement and Apple's sales-based harms, and to consider Apple's evidence only in isolation, rather than in its totality as required.

First, Samsung argues that Apple cannot show sales-based irreparable harm because "under the district court's interpretation [of the jury's verdict], the jury necessarily rejected Apple's lost profits claim." (SSBr.44.) That argument is both wrong and remarkable given that the district court explicitly and correctly ***rejected***

the identical theory. (A28-30 (denying Samsung's "speculative at best" theory "that the jury must have rejected Apple's demands for lost profits"); A6532-33.) Samsung's argument also is legally irrelevant because a showing of lost profits is not required to demonstrate irreparable harm. *See Mytee Prods., Inc. v. Harris Research, Inc.*, 439 F. App'x 882, 887 (Fed. Cir. 2011) ("We have never held, however, that in order to establish irreparable harm a patentee must demonstrate that it is entitled to lost profits….").

Second, Samsung asks the Court to completely disregard the conjoint study performed by Dr. Hauser, one of the most well-respected survey experts in the world. For example, Samsung states that Dr. Hauser's survey generated "implausibly inflated willingness-to-pay numbers" (SSBr.42)—even though no Samsung expert performed ***any*** independent research on that issue and Samsung's expert, Dr. Reibstein, admitted that the figures are "not strictly additive" (A3544-45). Moreover, Samsung does not even attempt to contest Dr. Hauser's separate "willingness-to-buy" calculations—which provide direct, statistically verified, and independent evidence that consumers would be unwilling to purchase Samsung's products with the infringing features removed. (A20491; A20493; A20495; A20497-98.)

Samsung also criticizes Dr. Hauser for performing a conjoint study at all (SSBr.42)—even though conjoint studies are "widely recognized as the most used

method for quantifying consumer demand for product features" (A11079) and Samsung previously criticized Apple for ***not*** using a conjoint analysis to quantify consumer demand (A24). Samsung further claims that Dr. Hauser's survey should have included more "major features that drive consumer decision-making" and more "non-infringing alternatives." (SSBr.40-41.) But Samsung's own witnesses conceded that Dr. Hauser's survey tested multiple "major" and "big purchase decision drivers" (A12080-81; A12315-16; A11689-90), and a single survey cannot test every (or even nearly every) potential driver of demand in a complex product such as a smartphone (A11106)—which Samsung states can include "hundreds of thousands of patent[ed features]." (SSBr.41-42.)

Samsung additionally argues that Dr. Hauser's survey results are "useless" because Dr. Reibstein concluded that some participants expressed "confusion and misunderstanding." (SSBr.42.) But at trial, Dr. Reibstein could not explain why he labelled certain participants as "confused," and the district court correctly found that Dr. Reibstein's cross-examination admissions "cast some doubt on [his] pretest and conclusions regarding confusion." (A24.)

Third, Samsung does not even purport to address evidence showing that Apple views the patented features as valuable to consumers. (AppleBr.52-54.) And in just two sentences, Samsung dismisses as irrelevant evidence showing that it too values Apple's inventions—including evidence showing that Samsung

studied, copied, praised, and promoted the patented features, and has refused to remove those features from all of its products. (SSBr.43-44.) But this Court has confirmed that evidence of the infringer's subjective beliefs (including copying evidence) "***is certainly relevant*** to the issue of nexus between the patent and market harm." *Apple III*, 735 F.3d at 1367 (emphasis added).

Samsung also incorrectly casts its documents as "at most show[ing] only discussions of generalized features related to the subject matter of the patents, not discussions specific to the patented features themselves." (SSBr.44.) As discussed in Apple's opening brief, those documents show that: (1) Samsung (and Google) engineers carefully studied and praised Apple's patented features; (2) Samsung has included the patented features in its products and promoted them in product manuals; and (3) Samsung has refused to confirm that it will refrain from all future use of the patented features, despite claiming to have existing design-arounds ready. (AppleBr.52-54.)

Fourth, in a single sentence devoid of substantive explanation, Samsung states that the district court considered Apple's sales-based evidence of irreparable harm "in the aggregate." (SSBr.44.) That is incorrect. As Apple detailed in its opening brief, the district court erroneously considered each item of irreparable harm evidence ***in isolation***, and not ***in its totality***, as this Court requires. (AppleBr.59-60.)

Finally, Samsung wrongly contends that Apple cannot rely on collective evidence from the three infringed patents because the infringing features "cannot be combined to create a single technology that drives consumer demand." (SSBr.45.) "[W]hen considering whether to enjoin a product, it is proper for the court to consider ***the aggregate harm caused by all of the infringing features***, rather than requiring a patentee to address each patent or claim individually." *Motorola*, 757 F.3d at 1330-31 (emphasis added); *see id.* at 1331 ("Infringement of multiple patents by a single device may strengthen a patentee's argument for an injunction by, for example, supporting its argument that the infringed features drive consumer demand or are causing irreparable harm."); *see also Apple III*, 735 F.3d at 1365 ("To hold otherwise could lead to perverse situations such as a patentee being unable to obtain an injunction against the infringement of multiple patents covering different—but when combined, all—aspects of the same technology, even though the technology as a whole drives demand for the infringing product.").

Apple presented overwhelming evidence of its irreparable sales-based losses—including evidence that consumers, Samsung, and Apple view the patented features as helping to drive consumer demand. The district court abused its discretion by dismissing that evidence and failing to consider it collectively.

II. SAMSUNG CANNOT JUSTIFY THE DISTRICT COURT'S ERRONEOUS FINDING THAT DAMAGES CAN FULLY REMEDY SAMSUNG'S INFRINGEMENT.

A. Damages Cannot Fully Compensate Apple For Its Irreparable Sales-Based Harms.

As Apple explained, the district court correctly found that "Apple has shown that its alleged lost sales harm would be difficult to calculate and remedy," but erred in finding—contradictorily—that money damages somehow ***could*** be calculated and ***could*** be used to remedy that harm fully. (AppleBr.60-63.) Samsung's attempt to salvage that flawed analysis fails.[5]

First, Samsung suggests that Apple waived the right to contest the district court's finding on this prong. (SSBr.47-48.) But on the very page that Samsung cites, Apple clearly explained that "the district court ruled against Apple on this prong based entirely on its ***erroneous*** conclusion that Apple failed to prove a causal nexus" and "that conclusion was ***wrong as a matter of law***." (AppleBr.62 (emphases added).)

Second, Samsung argues that Apple cannot prevail on this prong because Apple's damages expert, Dr. Vellturo, "purported to quantify Apple's claimed harm from lost sales." (SSBr.48.) Samsung ignores that the district court rejected

[5] Apple's opening brief explained that, after the district court denied injunctive relief, Apple sought an ongoing royalty to obtain the only available (though still inadequate) remedy for Samsung's continuing infringement. (AppleBr.25.) The district court has since ruled that Apple is entitled to an ongoing royalty (A6547), but Apple will forgo any such ongoing royalty prospectively for any units subject to injunctive relief.

this argument as "unpersuasive" and "contradict[ing]" other arguments that Samsung had made below (A32), and Samsung does not contest those rulings as an abuse of discretion here. To the contrary, even Samsung concedes that Dr. Vellturo made clear—both at trial and in his post-trial declaration—that his damages analysis "capture[d] ***only one aspect***" of Apple's sales-based losses, and did not seek to compensate Apple ***fully*** for all sales-based harms. (SSBr.49; A6507-10; A11322.)

Third, Samsung criticizes Mr. Schiller as having "no expertise in attempting to quantify damages." (SSBr.49.) But Apple did not offer Mr. Schiller as an expert to quantify harm. Rather, Mr. Schiller provided important factual testimony detailing the intense competition between the parties and the unique "ecosystem" of the smartphone market—in which every smartphone sale lost to Samsung can lead to unquantifiable lost downstream sales (e.g., future purchases of applications, music, and accessories). (A10449-50; *see* A21080.) The district court did not err in relying on this specific, relevant fact testimony.

Finally, in a footnote, Samsung attempts to distinguish this Court's holding in *Apple III* that "loss of customers and the loss of future downstream purchases are difficult to quantify," 735 F.3d at 1368, solely because "this Court simply vacated and remanded for the district court to re-perform the analysis." (SSBr.50 n.13.) Samsung does not explain how the disposition of that case undercuts the

holding stated ***in the same decision***. Samsung also asserts that *i4i* and *Qualcomm* involved "very different" facts from this case (*id.*), but fails to explain how those supposed differences refute the general rule that those cases summarized: i.e., that "loss of market share, brand recognition, and customer goodwill … may frequently defy attempts at valuation," *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010), and that difficulty in "estimating monetary damages reinforces the inadequacy of a remedy at law," *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 703 (Fed. Cir. 2008).

B. Damages Cannot Fully Compensate Apple For Its Irreparable Reputational Harms.

Apple detailed in its opening brief how the district court erred in holding that Apple's irreparable reputational harm can be calculated and remedied fully with damages—despite numerous decisions holding that harm to reputation is a classic type of injury that is extremely difficult, if not impossible, to calculate and rectify with money. (AppleBr.60-61.) Samsung's brief does not suggest otherwise.

First, Samsung states that Apple has "no evidence" showing reputational harm that cannot be compensated with damages, and that Apple relies on a "presumption" of irreparability. (SSBr.45-46.) As noted above, however, Apple relied on Mr. Schiller's unrefuted trial testimony describing the irreparable injury to Apple's reputation, and on numerous cases, including *Douglas Dynamics*, holding that injury to a reputation as an innovator ***cannot*** be calculated or

compensated fully with damages. (AppleBr.60-61.) *See Douglas Dynamics*, 717 F.3d at 1345 (reversing district court for failing to find "remedies at law inadequate to compensate … the [patentee's] reputation loss").

Samsung tries to diminish the importance of *Douglas Dynamics* by arguing that the decision involved patents and businesses "not comparable to those at issue here." (SSBr.47.) But *Douglas Dynamics* is no more limited to the snow blower industry than *eBay* was to online sales. The injury here is the same as that in *Douglas Dynamics*: irreparable reputational injury to a patentee that is known as an innovator, that competes directly with the infringer, and that carefully guards its right to exclude others from practicing its patented inventions. The district court erred when it declined to follow this Court's ruling by holding that the same facts demonstrate irreparable reputational harm in this case as well. *Douglas Dynamics*, 717 F.3d at 1345.

Samsung invokes *Martin v. Bimbo Foods Bakeries Distribution, Inc.*, No. 14-CV-17-BR, 2014 WL 2439954 (E.D.N.C. May 30, 2014), but that district court case did not involve patents and even recognized "there is authority for the general proposition that loss of goodwill may … make[] damages difficult to ascertain," *id.* at *6. The *Martin* court also was bound by Fourth Circuit law, which recognizes that "when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of good will," "monetary

damages are difficult to ascertain or are inadequate." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551-52 (4th Cir. 1994), *abrogated on other grounds by Winter v. NRDC, Inc.*, 555 U.S. 7 (2008).[6]

Third, Samsung points to Dr. Erdem's declaration as supposed proof that "well-established methodologies exist to quantify this type of harm." (SSBr.45-46.) As noted above, however, Samsung cannot evade *Douglas Dynamics* based on the conclusory post-trial assertions of an expert whose only trial opinions were dismissed as unreliable, and who did not even purport to apply the asserted "methodologies" in her own declaration. (A24-25; A3284-308.)

To the extent Samsung is arguing that Apple cannot meet this prong without expert testimony affirmatively stating that Apple's reputational injury cannot be fully compensated with damages, that argument should be rejected as inconsistent with *Douglas Dynamics* (which did not require any such proof) and as an impermissible categorical rule under *eBay*. *See Apple III*, 735 F.3d at 1364.

[6] Samsung also cites *Nutrition 21 v. United States*, 930 F.2d 867 (Fed. Cir. 1991), which says nothing about valuing reputational harm. And Samsung's two other cited decisions did not value a recognized innovator's reputational harm or involve patents. *See Dexter 345, Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011); *Torres Advanced Enter. Solutions LLC v. Mid-Atlantic Prof'ls Inc.*, No. PWG-12-3679, 2013 WL 531215, at *5 (D. Md. Feb. 8, 2013).

C. Apple's Limited Licensing Of The Patents-In-Suit Does Not Make Injunctive Relief Unavailable.

Samsung fails to show any error in the district court's ruling that Apple's handful of licenses covering the patents-in-suit—always entered with restrictions and as part of broad cross-licenses and/or to settle litigation—does not weigh against an injunction. (A35.)

Samsung points to the district court's comment that an August 2010 presentation provides "some indication" that Apple might have been willing to "license Samsung." (SSBr.51.) But that generic statement is not evidence that Apple was willing to license the three specific patents-at-issue here, or that Apple otherwise monetized those patents. In fact, the district court found that the presentation did ***not*** involve "a formal licensing offer"—because Apple presented no licensing terms and offered no specific patents, and because the presentation was actually "consistent with a demand to cease and desist from infringement" (A34; A20476; A12482-83)—hardly an offer to license and monetize the patents.

Second, Samsung contends that Apple's willingness to license HTC and Nokia "confirm[s] that Apple does not consider the '647, '172, and '721 patents to have such unique value that allowing competitors to use them would cause non-compensable harm." (SSBr.52.) But that argument ignores the prior findings of this Court and the district court that the same agreements did not render any Apple patents ineligible for an injunction—because both agreements cover large numbers

of patents, Apple executed both agreements to settle pending litigation, the Nokia contract is a mere "standstill" agreement, and the HTC agreement contains an anti-cloning provision. *Apple III*, 735 F.3d at 1370. (A33-34.)

Samsung's argument also improperly "hints at a categorical rule that Apple's willingness to license its patents precludes the issuance of an injunction," and disregards established law that "[a] plaintiff's past willingness to license its patent is not sufficient per se to establish lack of irreparable harm if a new infringer were licensed." *Apple III*, 735 F.3d at 1370.

III. SAMSUNG CANNOT ESTABLISH THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT THE BALANCE OF HARDSHIPS FAVORS APPLE.

The district court concluded that "Samsung will not face any hardship from the injunction," while Apple will "likely" suffer "substantial hardship" without an injunction because Apple's most "fierce" competitor can use Apple's own patented features to compete directly against Apple. (A36; A39-40; AppleBr.63-64.) Because Samsung identifies "no clear error of judgment or error of law in the district court's analysis," this Court should decline "to reweigh the various factors that go into the balance of hardships." *Apple III*, 735 F.3d at 1371.

First, Samsung argues that any harm to Apple is minimal because the infringing features are just "minor components" of "complex and multi-featured" devices, and because Samsung supposedly has removed them from many products.

(SSBr.52-54.) If anything, however, those claims confirm that a balancing of hardships ***favors Apple***—if the features are as minor and simple to design around as Samsung contends, then Samsung should be able to remove them without any hardship. *See Douglas Dynamics*, 717 F.3d at 1345 ("[If an infringer has a] non-infringing alternative which it could easily deliver to the market, then the balance of hardships would suggest that [the infringer] should halt infringement and pursue a lawful course of market conduct.").

Samsung's argument also would unfairly have injunctive relief hinge on the infringer's decision about how many other features to include in its products. Apple will not suffer any less harm if forced to continue competing against its own patented inventions simply because Samsung has chosen to combine Apple's patented innovations with those of others.[7]

Second, Samsung states that Apple's proposed injunction improperly "attempts to sweep in unadjudicated products" by covering features "not more than

[7] Samsung tries to sidestep the district court's well-supported finding that Apple will suffer "substantial hardship" if forced to compete against products containing Apple's own patented inventions by suggesting that the district court misquoted *Bosch*—which, according to Samsung, only applies in cases with "proven lost sales for a simple product" and where the infringer cannot "pay a damages judgment." (SSBr.53.) Nothing in *Bosch* limits its holding in such a restrictive manner. In fact, the dissent in *Bosch* described the majority's holding just as Apple does here. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1159 (Fed. Cir. 2011) (Bryson, J., dissenting) (observing the majority's holding that "requiring Bosch to 'compete against its own patented invention' is a hardship in itself'").

colorably different" from those found to infringe. (SSBr.54-56 & n.14.) But a "colorable differences" limitation is inherent in every patent injunction, regardless of whether expressly stated. *See Aevoe Corp. v. AE Tech Co.*, 727 F.3d 1375, 1383 (Fed. Cir. 2013) ("[W]hether 'colorable imitations' were explicitly mentioned in the injunction language or not, such imitations fell within its scope.").

Third, Samsung complains that an injunction might "force" it "to litigate, under threat of contempt, the question of what functionalities and what products" the injunction covers. (SSBr.55-56.) But that same risk exists for ***every*** injunction, and is the natural result of ***Samsung's decision*** to infringe and refusal to cease all future infringement. Moreover, this Court has instituted safeguards to prevent parties from improperly instituting or pursuing contempt proceedings. *See, e.g.*, *TiVo Inc. v. Echostar Corp.*, 646 F.3d 869, 881-83 (Fed. Cir. 2011) (en banc) (requiring "detailed accusation from the injured party setting forth the alleged facts constituting the contempt" to trigger contempt proceedings).

Fourth, Samsung alleges that Apple's proposed one-month sunset period "does nothing" to minimize Samsung's hardship—even now, eight months after the jury's infringement verdict. (SSBr.55-56.) That argument is contrary to law. *See Apple III*, 735 F.3d at 1363 ("We agree with Apple that a delayed injunction … may make an injunction more equitable, and, thus, more justifiable in any given

case."). It also conflicts with Samsung's repeated promises that it can implement all of its design-arounds well within that period. (AppleBr.19.)

Finally, without any legal or record citation, Samsung predicts that an injunction will adversely affect third parties such as carriers "selling pre-existing stock" and consumers "who might still be using accused products." (SSBr.56.) Potential "harm to consumers is more appropriately considered under the fourth factor." *Apple III*, 735 F.3d at 1371. But even so, this Court rejected similar unexplained predictions in *Apple III*, and should again here for the same reasons. *Id.* ("Samsung has not explained ***how*** an injunction would cause the asserted disruptions."). In addition, Apple only proposes to enjoin ***Samsung*** and those acting in concert with Samsung. (A39; A2696-98.) Apple is not seeking to enjoin any products for which it has received damages (A39), and the sunset period affords sufficient time to dispose of "pre-existing stock."

IV. SAMSUNG CANNOT ESTABLISH THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT THE PUBLIC INTEREST FAVORS APPLE.

Samsung does not dispute the district court's findings that enforcing Apple's patents benefits the public by promoting "encouragement of investment based risk" and by introducing alternative designs into the market. (A40-41; AppleBr.65-66.) Instead, Samsung argues that the public will be harmed if the injunction removes Samsung products from the marketplace—despite arguing at the same time that the patented features are trivial and "non-infringing alternatives are already available

for all of the patented features." (SSBr.56-58.) Samsung cannot have it both ways. If alternatives already exist, the public will not be deprived of ***anything***. Only Samsung faces any deprivation here—loss of its ability to continue using Apple's patented innovations without authorization—which ***serves*** the public interest.

CONCLUSION

The district court's denial of a permanent injunction should be reversed or, in the alternative, vacated and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of January, 2015, I filed the foregoing Reply Brief for Plaintiff-Appellant Apple Inc. with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(b).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,887 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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